Supreme Court, U.S.
FILED

001264 JAN 29 2001

No. —

IN THE
Supreme Court of the United States

GREGORY E. WEST,
Petitioner,

vs.

JOHNNIE MOORE, and
AT & T TECHNICAL SERVICES, INC.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

2. In determining whether to grant summary judgment under Fed. R. Civ. P. 56, should the District Court weigh all the evidence or consider only the evidence favoring the non-movant?

3. Whether the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56 is the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 50?

4. Is the Fourth Circuit Court of Appeals bound by the Supreme Court's ruling in *Reeves. v. Sanderson*, or does the unpublished nonprecedential decision issued by the Fourth Circuit Court of Appeals subsequent to the contrary ruling of the U.S. Supreme Court bind the appellant herein while securing his due process rights under the United States Constitution?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the rules of the Supreme Court of the United States.

1. Gregory E. West, Plaintiff/Appellant, Pro Se;

2. Johnnie Moore, Defendant;

3. AT & T Technical Services, Inc., Defendant/Appellee; and

4. Ronda Lynn Brown, Attorney for the Defendant/Appellee.

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---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The August 2, 2000, unpublished nonprecedential Opinion of the United States Court of Appeals for the Fourth Circuit and the August 16, 2000 Plaintiff-Appellant's Petition for Rehearing En Banc are attached as appendices.

JURISDICTION

This court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit decided on August 2, 2000, Petition for Rehearing En Banc denied on October 31, 2000, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute construed is Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, which prohibits discrimination because of race and sex.

STATEMENT

The United States District Court for the Eastern District of Virginia issued its order granting Summary Judgment in favor of defendant AT & T Technical Services, Inc. on December 9, 1999. Plaintiff appealed and the United States Court of Appeals for the Fourth Circuit issued an unpublished nonprecedential decision on August 2, 2000 adopting the District Court's findings. Relying on the Supreme Court's June 12, 2000 decision in *Reeves v. Sanderson Plumbing Products, Inc.*, petitioner then sought a rehearing En Banc under Fed. R. App. P. 35 and 40 because a change in the law occurred after the case was submitted, which was overlooked, and the Fourth Circuit Court's decision was in sharp conflict with this court's decision, and other circuits. Rehearing was denied on October 31, 2000.

(FACTS)

Petitioner, Gregory E. West, is a black male who was employed by AT & T Technical Services, Inc., as a Customer Service Representative (Senior Associate, Technical) from March 1994 until his involuntary discharge in April 1998. He was selected to succeed the incumbent of a position which petitioner had held previously for approximately a year and a half, and was assigned to training to prepare for new responsibilities. The training was abruptly terminated and petitioner was replaced by Wendy O'Toole, a white female, lower graded employee of lesser qualifications. O'Toole was immediately scheduled for training to qualify her for the position. Petitioner filed a charge of discrimination based on race and sex. Following pre-trial discovery and depositions

by the defendant, and denial of discovery by the plaintiff, the District Court granted summary judgment for the Defendant. The Fourth Circuit affirmed on the reasoning of the District Court.

Respondent AT & T claimed that Petitioner West was replaced because of the superior qualifications of the female employee. In its attempt to mislead the court for purposes of summary judgment, the defendant proffered false evidence concerning O'Toole's qualifications. The District court found that plaintiff had provided no evidence that defendant's promotion of O'Toole was because of race or gender since O'Toole was better qualified for the position than was the plaintiff due to significantly more experience with switch database programs. Here, the court disregarded plaintiff's clear and convincing evidence, including affidavits from supervisors and co-workers, submitted in opposition to the Motion for Summary Judgment, which proved the employer's reasons to be false.

In Exhibit A to Appendix A, O'Toole's resume', it is reflected that she had four years experience as a Telephone Switch Data Base Manager and a Switch Interface Programmer, performing database management on the following telephone equipment: **25 DVC DBX Secure switches, 5 Intecom S-80 Secure switches, 3 Intecom S-80 Commercial (non-secure) switches, 1 Intecom Telari Secure Switch, 1 AT & T 5ESS Commercial Switch, 1 OCTEL voice Messaging System, performing system level diagnostics on the above listed equipment to isolate malfunctions and assist in capacity planning.**

In Exhibit B to Appendix A, O'Toole's declaration, signed October 29, 1999, O'Toole further contended that she possessed "over five and a half years experience as a telephone switch data base administrator dealing with over 30 switches and multiple classification levels including both secure and non-secure switches." This evidence submitted by

defendant suggests that her experience as a switch data base administrator was acquired shortly after her departure from Marshall's Department Store. However, in Exhibit C to Appendix A, AT & T's performance evaluation of O'Toole, dated and signed on October 4, 1996 by Scott Rice, her supervisor, it is reflected under **"AREAS FOR IMPROVEMENT"**, that O'Toole required training in the "5ESS switch, the IBX switch and the DVC switch. Furthermore, it was recommended that a **"Proposed FY 97/98 training schedule"** include training in (ESS5551X: **CBT INTRODUCTION TO THE 5ESS**, ES5010, ES505A, ES505B, ES505C, ESD505D, ES505E, ES5561), CBT-101: **IBX TECHNICAL ORIENTATION**, DBT-205: **IBX STATION DATA BASE 7 DVC STATION DATABASE**, DBT-302)(6025).

Exhibit C to Appendix A directly conflicts with the claims of switch database experience of O'Toole represented in Exhibits A and B. Exhibit D to Appendix A is a memorandum from Scott Rice, O'Toole's supervisor, to Lydia Baker and Ann Howard on August 19, 1996 showing skill classifications and recommended training for the CTAP group. It not only shows that West was proposed for "journeyman" training as opposed to O'Toole's proposed "apprentice" training for the DVC switches, but also shows that O'Toole had no training in several areas, in particular, the Telari, DVC DBX secure, the IBX S0-80 secure & non-secure switches as alleged in her resume'.

Clearly, O'Toole's resume' and signed declaration misrepresent her true qualifications and skills at the time she replaced West in 1996. This defeats the defendant's proffered reason for placing O'Toole in the position. The evidence presented shows the falsity of defendant's proffered claim that O'Toole was better qualified than he was, and a jury would be entitled to infer the ultimate fact of intentional discrimination. The court failed to consider West's evidence proving the employer's falsity.

I. CERTIORARI SHOULD BE GRANTED SINCE THERE IS A SPLIT IN THE CIRCUITS WITH RESPECT TO WHETHER PROOF OF PREFERENTIAL TREATMENT FOR A MEMBER OF THE PREFERRED CLASS, FOR PRETEXTUAL REASONS, IS SUFFICIENT TO PRESENT AN EMPLOYMENT DISCRIMINATION CASE TO THE JURY.

Regarding the evidence necessary to create a factual issue under Title VII of the Civil Rights Act of 1964, this Court has stated ". . . [R]ejection of defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (emphasis added). This court stated in Reeves, ". . . evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation." Further, "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

Some circuits hold that the language of Hicks means that proof of a prima facie case coupled with proof of pretext is always sufficient to present a jury question. Other circuits disagree, and require direct evidence of discriminatory intent.

The Fourth Circuit is one of the circuits using the "pretext-plus" (direct evidence) test for determining the sufficiency of the evidence to present an employment discrimination case to the jury. *Theard v. Glasco, Inc.*, 47 F.3d 676 (4th Cir. 1995)

(stating to avoid summary judgment, plaintiff had to prove not only that the reason the employer presented was false, but that discrimination was the real reason).

A number of circuits agree that there must be additional evidence, other than evidence of a prima facie case, and pretext evidence, in order to create a jury question. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994)(stating the Supreme Court in Hicks did not mean prima facie case plus proof of pretext was always sufficient to present a jury question).

Other circuits have held that the elements of a prima facie case, plus evidence of pretext, are sufficient to create a jury issue. *See Gallo v. Prudential Residential Services*, 22 F3d 1219, 1224-25 (2d Cir. 1994) (stating intentional age discrimination may be demonstrated by reliance on the evidence that established the prima facie case and proof of pretext without necessity for any additional evidence).

The split in the circuits has been discussed by legal commentators. *See* Catherine J. Lanctot, Pretext-Plus After Hicks: The Circuit split remains, Wiley Employment Law Update 161 (1996); *C. Pledger, Rhodes v. Guiberson Oil Tools*; The Fifth Circuit's Approach to Pretext Evidence in Employment Discrimination, 57 LA. L. Rev. 1393; Catherine J. Lanctot, The Defedant Lies and the Plaintiff Loses: The Fallacy of the Pretext-Plus Rule in Employment Discrimination Cases, 43 Hastings L.J. 57 (1991).

Besides the split in the circuits, this Court should also review this case since the approach of the Fourth Circuit is inconsistent with the indirect evidence method of proof mandated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804-05 1973, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), Hicks, 509 U.S. 502 (1993), and *Reeves v. Sanderson*. The theory underlying these cases is that an employer in an employment discrimination case will not ordinarily admit

employment discrimination, and because of the permissible inference of the ultimate fact of discrimination due to falsity of the employer's explanations. Because of the unavailability of direct evidence, this Court adopted the indirect burden-shifting method of proof. Requiring direct evidence (i.e., "pretext plus") cannot be reconciled with this Court's holdings in these cases.

II. CERTIORARI SHOULD BE GRANTED SINCE THE FOURTH CIRCUIT'S WEIGHING OF ALL THE EVIDENCE IS INCONSISTENT WITH THE APPROACH OF OTHER CIRCUITS WHICH CONSIDER ONLY THE EVIDENCE FAVORING THE NON-MOVANT, AND SINCE THIS APPROACH FAILS TO TAKE INTO ACCOUNT THIS COURT'S TEACHING IN *REEVES v. SANDERSON* THAT THE STANDARDS FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50 AND GRANTING SUMMARY JUDGMENT UNDER RULE 56 ARE THE SAME.

In granting the defendant's Motion for Summary Judgment the District Court found that Plaintiff had not shown the existence of material facts in dispute. In so finding, the court disregarded Plaintiff's evidence addressing both the issue of retaliation and proof of the falsity of the employer's information concerning the qualifications of the preferred employee versus his own qualifications. In holding that the Plaintiff's facts did not provide any "evidence" to the court that AT & T's promotion of the preferred employee was because of her race or gender, the Court applied an evidentiary standard which is the exclusive province of a jury. Whether the issues raised by Plaintiff are evidentiary, or whether the employer's proffered reasons are false, are issues of fact for a jury to decide, not the court. As this court held in Reeves, " . . . the standard for judgment as a matter of law

under Rule 50 mirrors the standard for summary judgment under Rule 56 . . . Thus, the court must review all of the evidence in the record . . . drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence. . . . The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." In this case, the Circuit Court disregarded the weight of the non-movant's evidence.

The Fourth Circuit's standard of review is inconsistent with other circuits, as well as *Anderson v. Liberty Lobby, Inc.*, and *Reeves v. Sanderson Plumbing Products, Inc.*, which hold that the standards for judgment under Rules 50 and 56 are the same. The Fourth Circuit's weighing of all the evidence, rather than determining only whether non-movant's evidence supports the verdict, is contrary to the rule in other circuits.

Even before Reeves, courts have held that the Rule 56 standard also applies under Rule 50. *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1263 (10th Cir. 1998) (stating standard for judgment as a matter of law is essentially identical to "genuine issue" requirement in summary judgment context).

If the Fourth Circuit had applied the Reeves teaching that the Rule 56 standard also governs Rule 50, the Court could not have granted a motion for summary judgment. The submission of false information by the employer clearly created "genuine issues of material fact".

III. THE SUPREME COURT SHOULD GRANT CERTIORARI SINCE A SERIOUS CONSTITUTIONAL QUESTION IS PRESENTED WITH RESPECT TO PROTECTION OF THE DUE PROCESS RIGHTS OF THE APPELLANT-/PETITIONER.

Article III, Section 1 of the United States Constitution provides that "The judicial Power of the United States, shall be vested, in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish". By logical extension, all inferior courts, including the Fourth Circuit Court of Appeals, are courts which must adhere to the rulings of the Supreme Court. As this court has held: The Supreme Court has broad supervisory power over judgments of lower federal courts. *U.S. v. Munsingwear, Inc.*, 71 S.Ct. 104, 340 U.S. 36, 95 L.Ed. 36 (1950); The Supreme Court has power to do justice as the case requires. *Tinder v. United States*, 73 S.Ct. 911, 345 U.S. 565, 97 L.Ed. 1250 (1953); The United States Supreme Court has plenary authority to make such disposition of the case as may be just under the circumstances. *Haynes v. U.S.*, 88 S.Ct. 722, 390 U.S. 85, 19 L.Ed. 2d 923 (1968). In the instant case, the Fourth Circuit Court of Appeals completely ignored this court's holding in *Reeves v. Sanderson*, but rather, apparently took the approach of the Fifth Circuit Court of Appeals which had been struck down by this court.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. Black's Law Dictionary 500(6th ed. 1990). (emphasis

supplied). As this court has held: the fundamental requisite of due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest and to assert before the appropriate decision-making body the reasons for such choice. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 336, 70 S.Ct. 652, 94 L.Ed. 865 (1950). An unpublished nonprecedential decision in which no rationale or explanation is given neither meets this fundamental requisite nor affords the Appellant any right of controverting material facts which bear on the questions at issue in this case. The right of due process is denied thereby. Had the Fourth Circuit Court of Appeals applied the teachings of the Supreme Court's decision in *Reeves v. Sanderson* to the instant case, rather than mere rubber stamping, the Appellant's evidence would have received the proper weight thereby preserving his right of due process.

CONCLUSION

This case presents a serious due process question as well as a question of the role of the circuit courts and the role of the jury in employment discrimination cases. Since the courts of appeals have taken different approaches on the issue of this court's teachings regarding Rule 50 and Rule 56, review by this court is warranted.

Respectfully submitted,

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APPENDIX A

[Filed Aug, 16 2000]

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

Civil Action No. 1237

GREGORY E. WEST,
Plaintiff-Appellant

v.

AT & T TECHNICAL SERVICES, INC.

Appeal from the United States District Court for the Eastern District of Virginia No. 99-742-A

PLAINTIFF'APPELLANT'S PETITION FOR REHEARING EN BANC

INTRODUCTION

Plaintiff petitions the court for a rehearing En Banc under Rule 35 of the Federal Rules of Appellate Procedure because in counsel's judgment, one or more of the situations exist as described in Rule 40, namely, material facts were overlooked in the decision; a change in the law occurred after the case was submitted, which was overlooked by the panel, and the courts' decisions are in sharp conflict with the decision of the U. S. Supreme Court, and other circuits.

I A CHANGE IN THE LAW OCCURRED AFTER THE CASE WAS SUBMITTED AND WHICH WAS OVERLOOKED BY THE PANEL

The U.S. Supreme court decision of *Reeves v. Sanderson Plumbing Products, Inc*, 530 U.S.—(2000) clearly impacts as a change in the law which occurred after the case was submitted and which was overlooked by the panel. The District court applied the incorrect legal standard in determining that the Defendant was entitled to summary judgment.

As pointed out by the Supreme Court in *Reeyes v. Sanderson Plumbing Products, Inc.*, 530 U.S.—2000, ". . .evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation"

The District court found that Plaintiff had provided no evidence that Defendant's promotion of Ms. Wendy O'Toole was because of race or gender since *Ms. O'Toole was better qualified for the position than was the Plaintiff* due to *significantly more experience with switch database programs.* Here, the court disregarded Plaintiff's clear and convincing evidence, including affidavits from supervisors and co-workers, submitted in opposition to the Motion for Summary Judgment, which proved the employer's reasons to be false.

In Exhibit A, Ms. O'Toole's resume', it is reflected that she had four years experience as a Telephone Switch Data Base Manager and a Switch Interface Programmer, performing database management on the following telephone equipment: *25 DVC DBX Secure switches, 5 Intecom 5-80 Secure switches, 3 Intecom S-SO Commercial (nonsecure) switches, 1 Intecom Telari Secure Switch, 1 AT&T 5ESS Commercial Switch, 1 OCTEL Voice Messaging System, performing system level diagnostics on the above listed*

equipment to isolate malfunctions and assist in capacity planning. In Exhibit B, Ms. O'Toole's Declaration, signed October 29, 1999, Ms. O'Toole further contends that she possessed " over five and a half years" experience as a telephone switch data base administrator dealing with over 30 switches and multiple classification levels including both secure and non-secure switches". This evidence submitted by Defendant suggests that her experience as a switch data base administrator was acquired shortly after her departure from Marshall's Department Store. However, in AT&T's performance evaluation of Ms. O'Toole, dated and signed October 4, 1996, by her supervisor, Scott Rice, Exhibit C, also submitted in evidence by Defendant, it is reflected under "AREAS FOR IMPROVEMENT", that Ms. O'Toole required training in the "5E55 switch, the IBX switch, and the DVC switch". Furthermore, it was recommended that a "Proposed FY 97/98 training schedule" include training in (ESSS551X: *CBT INTRODUCTION TO THE 5ESS*, ES5O1O, ES5OSA, E5505B, E5505C, E5505D, E5505E, ES5561), (CBT-1O1: *IBX TECHNICAL ORIENTATION*, DBT-205: IBX *STATION DATABASE & PVC STATION DATABASE*, DBT-302)(6025). Exhibit C directly conflicts with the claims of switch database experience of Ms. O'Toole represented in Exhibits A arid B. Exhibit D is a memorandum from Scott Rice to Lydia Baker and Anna Howard, dated August 19, 1996 showing skill classifications and recommended training for the CTAP group. It not only shows that Mr. West was proposed for " journeyman" training as opposed to Ms. O'Toole's proposed "apprentice" training for the DVC switches, but also shows that Ms. O'Toole had no training in several areas, in particular, the Telari, DVC DBX secure, the IBX 5-80 secure & non-secure switches as alleged in her resume'. This is further supported in the affidavit of Lydia Baker, Ms O'Toole's previous supervisor, as follows: 8. . . "Gregory became the database person of the Assignment Bureau, and on March 1, 1995 he received a pay increase for

the promotion to the database position During this time, Wendy O'Toole did not perform any switch database work. Wendy O'Toole did not receive any training to do any switch database work." (Exhibit A to Plaintiff's Opposition to Motion for Summary Judgment). Clearly, Ms. O'Toole's resume' misrepresents her true qualifications and skills at the lime she replaced the Plaintiff in 1996. This defeats the Defendant's proffered reason for placing Ms. O'Toole in the position. The evidence presented by Plaintiff shows the falsity of Defendant's proffered claim that Ms. O'Toole . was better qualified than he was, and a jury would be entitled to reject Defendant's reason for replacing Plaintiff with Ms. O'Toole, and, would be entitled to infer the ultimate fact of intentional discrimination. As further held by the Supreme Court, "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose . . . . the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt" Reeves, *Id.* citing *Wright v. West*, 505 U.S. 277, 296 (1992). Further, "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated". Herein lies a genuine issue of material fact that was overlooked by the court.

II. THE OPINION IS IN CONFLICT WITH A DECISION OF THE UNITED STATES SUPREME COURT OR OTHER CIRCUITS

Petitioner respectfully submits that both the District Court's decision and the decision of the Panel are in direct conflict with the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.—(2000) as well other Circuit court decisions.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Products, Inc., 530* U.S.—(2000) citing *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 246 (1986)

In granting the defendant's Motion for Summary Judgment on December 16, 2000, the District court found that Plaintiff had not shown the existence of material facts in dispute. In so finding, the court overlooked Twelve (12) genuine issues of material fact which were supported by seven (7) sworn affidavits, addressing both the issue of his qualifications versus those of Ms. O'Toole, and the issue of retaliation. In holding that Plaintiffs facts do not provide any "evidence" to the court that AT&T's promotion of Ms. Wendy O'Toole was because of her race or gender, the Court applied an evidentiary standard which is the exclusive province of a jury. Whether the issues raised by the Plaintiff are "evidentiary", are issues of fact for the jury to decide , not the court. The Supreme Court holds that ". . .*the standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56 . . . . Thus, the court must review all of the evidence in the record . . . . drawing all reasonable inferences in favor of the non-moving party, but making no credibility determinations or weighing any evidence . . . . The latter functions, along with the thawing of legitimate inferences from the facts, are for the jury, not the court . . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe*" *Id.* at 14-16

/s/ Gregory E. West
GREGORY E. WEST

CERTIFICATE OF SERVICE

I, Gregory E. West, Plaintiff-Appellant, Pro Se, certify that two (2) copies of this Petition for Rehearing En Banc have been mailed to the party shown below:

RONDA L. BROWN
MCGUIRE, WOODS, BATTLE
& BOOTHE LLP
1750 Tysons Boulevard
Suite 1800, Tysons Corner
McLean, Virginia 22102

This 16th Day of August, 2000

/s/ Gregory E. West
GREGORY E. WEST

Wendy E. O'Toole
8741 Susquehanna St.
Home Phone: 703-690-4698
Work Phone: 703-874-1331

OBJECTIVE To obtain a position in the computer field enabling me to grow and expand on my related telecommunications experience.

Summary of Qualifications

Four years experience as a Telephone Switch Database manager dealing with over thirty systems and multiple classification levels. Over nine years experience in customer interaction, including the handling of sensitive information and determining user and system requirements. I currently hold a TS/SCI ISSA security clearance with polygraph.

EXPERIENCE

Switch interface Programmer AT&T Technical Services
February 1994-Present

Perform database management on the following telephone equipment:

- 25 DVC DBX Secure switches
- 5 Intecom S-80 Secure switches
- 3 Intecom S-80 Commercial(non-secure) swithes
- 1 Intecom Telari Secure Switch
- 1 AT&T 5ESS Commercial Switch
- 1 OCTEL Voice Messaging System

- Perform system level diagnostics on above equipment to isolate malfunctions and assist in capacity planning.
- Interact with customers to determine planning and user requirements, also interface with customer in a help desk capacity.

- Coordinate with project officers and technicians to add new services and database changes.

Customer Service Representative AT&T Technical Services February 1994-August 1996

- Served as point of contact for project officers and customer.
- Determined customer requirements for writing and processing work orders and job requests.
- Duties included creating, researching and maintaining database.

Customer Service Desk Assistant/Cashier, Marshall's Department Store August 1993-February 1994

- Coordinated displays.
- Assisted with layaway plans and handling of money.

Independent Contractor Central Intelligence Agency August 1989-November 1983

- Escorted applicants through secure facility.
- Reviewed and maintained applicants personal history files.

OTHER SOFTWARE EXPERIENCE

- Lotus Notes Fox Pro SRS Trouble Reporting System
- MS Word MS Excel MS PowerPoint
- Ms Access Internet DOS 5.0

EDUCATION

- AT&T 5ESS Certified Maintenance Course, AT&T
- DBX Telephone Switch Database Certification, Digital voice Corporation

- Bachelor's Degree Candidate-Business, George Mason University
- Business Major-Mount St. Mary's College

ACHIEVMENTS

- Co-founder of Mu Tau chapter of Delta Sigma Pi, a professional business fraternity.
- Have received three letters of commendation from AT&T Technical Services.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 99-742A

GREGORY E. WEST.

Plaintiff,

v.

JOHNNIE MOORE, AND AT&T TECHNICAL SERVICES, INC.,

Defendants.

DECLARATION OF WENDY O'TOOLE

COMES NOW Wendy O'Toole who, under 28 U.S.C. § 1746, declares under penalty of perjury that the forgoing is true and correct:

1. I began working for AT&T Technical Services Company, Inc. ("AT&T") in February 1994 as a customer service representative on the Operations and Maintenance Network Information Systems ("OMINIS") contract, and I was assigned to work at the Central Intelligence Agency ("CIA"). I am currently employed by AT&T as a switch database administrator.

2. AT&T is a contractor with the United States Government.

3. I have over five and a half years of experience as a telephone switch database administrator dealing with over thirty switches and multiple classification levels including both secure and non-secure switched. In addition. I have a completed the AT&T 5SES Certified Maintenance Course and received the DBX Telephone Switch Database Certification. See resume attached as Exhibit 1.

4. On or around September 1996, Nicholas Vukson assigned me to the switch database administrator position, At that time, Joe Puglisi was being transferred to another position on the OMNIS contact.

5. Prior to being assigned to the switch database administrator position, I was Mr. Puglisi's "back-up" for approximately one year. During this time, my work station was in the same vicinity as Mr. Puglisi's work station, and I was responsible for assisting Mr. Puglisi was with the switch database administrator duties on a daily basis. In addition, when Mr Puglisi duties on a daily base. In addout of the office, I assumed full responsibility for the switch database administrator duties.

6. While acting as Mr. Puglisi's "back-up", I was able to gain significant experience with two new switch database systems that were implemented in the Centralized Telephone Assignment Process ("CTAP") group in early 1996.

7. During the time I served as Mr. Puglisi's "back-up" in the CTAP group, Gregory West was assigned to the Expedited Service Order Process ("WSOP") group, and he worked in a different tower of the building.

AND FURTHER THE DECLARANT SAYETH NOT.

_____ Wendy O'Toole

Date WENDY O'TOOLE

AT&T TECHNICAL SERVICES COMPANY
— PERFORMANCE APPRAISAL —

EMPLOYEE'S NAME Wendy O'Toole SOC. SEC. NO. 238-23-8863

START DATE OF CURRENT ASSIGNMENT 09/17/95 APPRAISAL DATE 10/01/95 PERIOD 9/30/96

PROGRAM OMNIS LOCATION OMNIS

MAJOR RESPONSIBILITIES (Listed at Beginning of Appraisal Period)

Generate telephone Service Orders based on customer requests. This process requires Project Manager and technician interface and follow up as well as data collection, querying and multiple database entries into telephone switching systems and supporting tools. Provide backup switch database support as needed. Work as directed by supervisor.

SUPERVISOR SIGNATURE

EMPLOYEE'S SIGNATURE

Ratings for each of the performance dimensions should be based on the performance standards applicable to that dimension. Refer to the instruction for determining the overall rating.

Cite any documentation added to employee's file (e.g., commendations, counseling, discipline, etc.) Supervisors may list additional information under "Performance Comments" and "Areas for Improvement." (Note - If experience with individual is insufficient to appraise, indicate "Not Assessed" in Performance Comments).

RATING DIMENSIONS

1. CORE VALUES (Respect for others including diversity, highest standard of integrity, dedication to service excellence and teamwork).

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☒	☐
Consistently produced superior results	Frequently exceeds requirements	Meets requirements	

Performance Comments
Wendy meets the requirement on core values although improvement can be made in area of teamwork.

EXHIBIT C

2. QUALITY OF WORK (Extent to which work produced meets quality requirements. Includes accuracy, thoroughness and efficient use of resources).

Outstanding	Above Average	Average	Needs Improvement
☐	☒	☐	☐

Performance Comments
Wendy maintains above average ratings on the quality of her work and her use of resources.

3. QUANTITY OF WORK (Volume of work regularly produced speed and consistency of output).

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☐	☒

Performance Comments
Wendy has been consistent in her output although it's normally lower than expected.

4. DEPENDABILITY (Regular and punctual attendance. Follows through and completes assignments).

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☒	☐

Performance Comments
Wendy meets the requirement ratings on dependability. She follows through and completes her assignments but needs to improve in her punctual attendance and follow established procedures when calling in.

5. INITIATIVE (Performs well on own initiative with little or no supervision, demonstrates an innovative approach)

Outstanding	Above Average	Average	Needs Improvement
☐	☐	☒	☐

Performance Comments
Wendy meets the requirement.

AREAS FOR IMPROVEMENT (Must be completed for rating areas that are graded as "Needs Improvement")

Area	Action Recommended
Quantity of Work	The output volume of Service Orders has been consistently low without justification. Primary responsibility will now be station database and not Service Order generation.
Personal calls	Limit the number of personal calls, it appears to be affecting performance.
TRAINING (5ESS) (IBX) (DVC)	Proposed FY 97/98 training schedule (EBS651X,EBS010,EBS06A,EBS06B,EBS06C, EBS06D,EBS06E,EBS661)(CBT-101, DBT-205,DBT-302)(8025)

Determination of Overall Performance Rating

The Overall Rating is derived from the five dimension ratings. Each heading, below, shows the average of the five scores of dimension ratings that would result in that Overall Rating.

Outstanding Rating
Avg. of 2.6 - 3.0

Ex. O O O AA AA
3 + 3 + 3 + 2 + 2 = 13
13 divided by 5 = 2.6

Above Average Rating
Avg. of 1.8 - 2.5

Ex. O O O AA A
3 + 3 + 3 + 2 + 1 = 12
12 divided by 5 = 2.4

Average Rating
Avg. of 1.7 - ↓

Ex. O AA A A A
3 + 2 + 1 + 1 + 1 = 8
8 divided by 5 = 1.6
*Can not have 2 NI's and be rated average.

Needs Improvement Rating
Any combination with two or more NI's (0's)

Ex. O + A + NI + A + NI
3 + 1 + NI + 1 + NI
2 NI's = Needs Improvement Rating

Overall Rating Δ

Evaluator/Reviewer (Immediate Supervisor)

Scott C. Rice — Name Printed or Typed

Signature — Date 10/4/96

Approved by (Officer of the company)

Name Printed or Typed

Signature — Date

I have had the opportunity to review this document and discuss its contents with my supervisor. My signature acknowledges that I have been informed of my Overall Rating, but does not necessarily indicate agreement with my Overall Performance Rating.

Employee's Signature — Date

UNCLASSIFIED

NOTE FOR: Lydia V. Baker Y
Anna Howard Y

FROM: Scott C. Rice Y

DATE: 08/19/96 02:33:45 PM

SUBJECT: Training

I'm trying to identify the training classes we need in order to better complete our jobs. I've attached a training chart showing everyone currently in the group and where I believe them to be in skill classification. Please review it and make any RED LINE changes you feel are needed. Also, if you look at the legend you'll see the numbers of employees which should fall into the apprentice, journeymen, and specialist levels. further below that, I've listed everyone again and made a stab at spreading out the training in an attempt to meet the legend. I allocated the training over two years and although the names can change, right now it's important that we get the budget items in. Again don't get hung up on names but concentrate on the classes and the volume of classes. I need this back by COB 8/20/96

	FY97/98 Proposed Training required for CTAP personnel										
EQUIP	DVC 1200	DVC 3000	Mitel 50	Mitel 200	Telsri	Meridia Legend	Dim 400	Dim 2000	SYS 75	75 XE	G2
Personnel											
Baker, Lydia	J	J	N	N	N	N	N	N	N	N	N
Brown, Lucy	A	A	N	N	N	N	N	N	N	N	N
Bryne, Cynthia	A	A	N	N	N	N	N	N	N	N	N
Crawford, Barbara	A	A	N	N	N	N	N	N	N	N	N
Howard, Anna	J	J	N	N	N	N	N	N	N	N	N
Kochentiel, Ed	N	N	N	N	N	N	N	N	N	N	N
McBride, Deloris	J	J	N	N	N	N	N	N	N	N	N
Medlin, Ed	N	N	N	N	N	N	N	N	N	N	N
O'Toole, Wendy	A	A	N	N	N	N	N	N	N	N	N
Puglisi, Joe	A	A	N	N	A	N	N	N	A	N	N
Rector, Lisa	A	A	N	N	N	N	N	N	N	N	N
Rice, Scott	N	N	N	N	N	N	N	N	N	N	N
Tinner, Tisha	A	A	N	N	N	N	N	N	N	N	N
West, Greg	J	J	N	N	N	N	N	N	N	N	N
FY97/98 Proposed Training required for CTAP personnel											
Baker, Lydia											
5E5010	Switch architecture										
5E506A	Switch Translations: essentials for recent change										
5E505B	Switch Translations: recent change for business applications										
5E506C	Switch Translations: recent change for ISDN										
5E505D	Switch Translations: recent change for routing, charging, and digit analysis										
5E506E	Switch Translations: recent change for trunks										
	DVC Station Database										
359	Introduction to ISDN (learning tree)										
Brown, Lucy											
5E5551X	*CBT Introduction to the 5ESS										
CBT-101	*IBX Technical Orientation										
DBT-205	IBX Station Database										
	DVC Station Database										
Bryne, Cynthia											
5E5551X	*CBT Introduction to the 5ESS										
CBT-101	*IBX Technical Orientation										
DBT-205	IBX Station Database										
	DVC Station Database										
OCTEL	n/a	System operation and management									
OCTEL	n/a	Sierra Installation and Maintenance									
OCTEL	1104	Decision Pro Report Writing (p/n 001-75227)									
Crawford, Barbara											
5E5551X	*CBT Introduction to the 5ESS										
CBT-101	*IBX Technical Orientation										
DBT-205	IBX Station Database										
	DVC Station Database										

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-1237

GREGORY E. WEST,
Plaintiff-Appellant,

v.

AMERICAN TELEPHONE & TELEGRAPH TECHNICAL SERVICES, INCORPORATED,
Defendant-Appellee,

and

JOHNNIE MOORE,
Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude N. Hilton, Chief District Judge. (CA-99-742)

Submitted: July 27, 2000 Decided: August 2, 2000

Before MURNAGHAN, WILKINS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Gregory E. West, Appellant Pro Se. Ronda Lynn Brown, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., McLean, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. *See* Local Rule 36(c). .

PER CURIAM:

Gregory E. West appeals the district court's order granting the Defendant's motion for summary judgment in his civil action in which he alleged employment discrimination based upon race, gender, and retaliation. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. *See West v. Moore*, No. CA-99-742 (E.D. Va. Dec. 16, 1999).* We dispense with oral argument because the facts and legal contentions are adequately 'presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

---

* Although the district court's order is marked as "filed" on December 15, 1999, the district court's records show that it was entered on the docket sheet on December 16, 1999. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the order was entered on the docket sheet that we take as the effective date of the district court's decision. *See Wilson v. Murray*, 806 F.2d 1232, 1234-35 (4th Cir. 1986)

FILED

001264 JAN 29 2001

OFFICE OF THE CLERK

No. —

IN THE

Supreme Court of the United States

GREGORY E. WEST,

Petitioner,

vs.

JOHNNIE MOORE, and
AT & T TECHNICAL SERVICES, INC.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL APPENDIX

GREGORY E. WEST
PETITIONER PRO SE
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7 pp

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Filed Dec. 9, 1999]

Civil Action No. 99-742-A

GREGORY E. WEST,

Plaintiff,

v.

AT & T TECHNICAL SERVICES, INC.,

Defendant.

ORDER

This matter comes before the Court on the Defendant AT&T Technical Service's Motion for Summary Judgment. The Court has considered the Motion and the parties' responses in regard to the Defendant's Motion for Summary Judgment and the Court finds that the Motion for Summary Judgment should be GRANTED and further argument would be of no benefit to the Court. It is hereby

ORDERED that case be removed from the December 20, 1999 trial docket and a Memorandum and Order reflecting the Court's ruling will follow.

/s/ Claude M. Hitton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
December 9, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 99-742-A

GREGORY E. WEST,

Plaintiff,

v.

AT&T TECHNICAL SERVICES, INC.,

Defendant.

MEMORANDUM OPINION

This matter comes before the Court on the Defendant AT&T Technical Service's Motion for Summary Judgment.

Plaintiff filed this Complaint against AT&T Technical Services, Inc. ("AT&T") and Johnnie Moore seeking damages under Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.*, for incidents arising out of his employment with AT&T. This Court dismissed Defendant Johnnie Moore from this case and dismissed the Plaintiff's retaliatory discharge claim against AT&T. The only remaining claims are claims of race and sex discrimination and retaliation. AT&T now moves for Summary Judgment in this case on the grounds that there are no material facts in dispute, that the Plaintiff has no evidence to prove that the promotions made by AT&T were made on the basis of the Plaintiff's race or gender and that the Plaintiff has put forth no evidence that AT&T retaliated against him after he filed a complaint of discrimination. Plaintiff alleges that AT&T discriminated against him on the basis of his race and gender when it selected a white female, Wendy O'Toole, to succeed Joe

Puglisi as the switch database technician for the Centralized Telephone Assignment Process. Plaintiff also alleges that AT&T retaliated against him by assigning him to the STRIP program, eliminating his position on the OMNIS contract and refusing to give him the use of a company car. Plaintiff alleges that these retaliatory actions constitute race and/or gender discrimination. AT&T denies these allegations and asserts that Ms. O'Toole was chosen for the position in question because she was better qualified than the Plaintiff. AT&T now moves for Summary Judgment in this case.

Summary Judgment is appropriate under Rule 56 (c) when there can be "no genuine issues as to any material fact." Only material facts, those facts relating to the elements of the claim made, are at issue in considering Summary Judgment since "a complete failure of proof concerning an essential element of a party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

It is well-established in the Fourth Circuit that to survive a Motion for Summary Judgment the non-moving party must produce "specific facts showing that there is a genuine issue for trial rather than resting upon the bald assertions of his pleadings." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

To prove a Title VII case in this jurisdiction, a Plaintiff must prove that: (1) he is a member of the protected class; (2) he applied for the position in question: (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *See Evans v. Technologies Applications & Service Company*, 80 F.3d 954, 959-60 (4th Cir. 1996); *Amirmokri v. Baltimore Gas & Electric Company*, 60 F.3d 1126, 1129 (4th Cir. 1995); *Holmes v. Bevitacqua*, 794 F.2d 142,-147 (4th Cir

In this case, there are no material facts in dispute regarding the fourth element that the Plaintiff must prove to establish his *prima facie* case. The Plaintiff presents facts in dispute in his response and reply. However, the facts he presents in rebuttal to the Motion for Summary Judgment are not material facts. They do not provide any evidence to the Court that AT&T's promotion of Ms. Wendy O'Toole was because of her race and gender. Evidence was provided that, in fact, Ms. O'Toole had significantly more experience with switch database programs. It is also true that Ms. O'Toole served as Mr. Joe Puglisi's back-up before replacing him at the position in question. There is no evidence presented by the Plaintiff that proves he was not chosen for the promotion due to his race or gender. Plaintiff makes those bare allegations based solely on his opinion that race and gender were motivating factors. It is clearly established that mere allegations alone are not sufficient to make out a *prima facie* case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Carroll v. United Steelworkers of America*, 498 F. Supp. 976, 978 (D. Md. 1980), *aff'd*, 639 F.2d 778 (4th Cir. 1980). As the Plaintiff has failed to make out his *prima facie* case under Title VII, the Motion for Summary Judgment should be granted and this case should be dismissed.

Plaintiff's claim of retaliation also fails. Under Title VII, the Plaintiff carries the burden of proving intentional discrimination and retaliation on the part of the employer because the Plaintiff is a member of a protected class. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The Supreme Court established a process to determine if the employer intentionally discriminated against an employee: (1) the Plaintiff has the burden to prove by a preponderance of the evidence that a *prima facie* case of discrimination and retaliation exists; (2) the burden shifts to the Defendant to rebut the presumption established by the Plaintiff by articulating a legitimate, non-discriminatory and non-retaliatory reason for its actions; and (3) if the Defendant

employer rebuts the presumption of discrimination by the Plaintiff, the Plaintiff must prove that the employer intentionally retaliated or discriminated against him. *See Gillins v. Berkeley Electric Cooperative.*, 148 F.3d 413, 416-17 (4th Cir. 1998). As discussed above, the Plaintiff in this case cannot establish a *prima facie* case of race or gender discrimination and therefore this claim fails.

An appropriate Order shall issue.

/s/ Claude M Hilton
CLAUDE M. HILTON
CHIEF UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia
December 15, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[FILED October 31, 2000]

No. 00-1237
CA-99-742

GREGORY E. WEST
Plaintiff - Appellant

v.

AMERICAN TELEPHONE & TELEGRAPH
TECHNICAL SERVICES, INCORPORATED
Defendant - Appellee

and

JOHNNIE MOORE
Defendant

On Petition for Rehearing En Banc

The appellant's petition for rehearing en bane was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
PATRICIA S. CONNOR
CLERK